(1)

Supreme Court, U.S.
FILED

No. 00 915 SEP 25 2000

IN THE

Supreme Court of the United States

MICHAEL C. DUPONT,

Petitioner,

v.

LUIS BUSTAMANTE,

Respondent,

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a prosecutor provided legal advice to a criminal investigation and applied to a county judge for an arrest warrant against a suspect of the investigation. The prosecutor submitted the sworn affidavit of an investigator and a proposed arrest warrant. In accordance with local practice and custom, by submitting the investigator's affidavit and signing the proposed warrant as the person requesting the warrant, the prosecutor represented to the judge his personal knowledge of the evidence and vouched for the truth and sufficiency of the investigator's affidavit. Yet, the prosecutor did not personally appear before the judge or in court nor did he file any motion or present any legal argument. These events took place while the investigation was ongoing and the warrant was procured a month and a half before the prosecutor filed any criminal charge against the suspect.

In performing the above actions, was the prosecutor performing his duty as an advocate in preparing for the initiation of judicial proceedings?

Does submitting the investigator's sworn affidavit rather than his own sworn affidavit provide the prosecutor absolutely immune from liability under 42 U.S.C. § 1983 even though he vouched for the truth and sufficiency of the investigator's affidavit?

PARTIES TO THE PROCEEDING

Petitioner is Michael C. DuPont ("DuPont").

Respondent is Luis Bustamante ("Bustamante" or "prosecutor").

CORPORATE DISCLOSURE STATEMENT

DuPont is an individual. Therefore, there are no parent corporations or subsidiaries.

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DuPont respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The Eleventh Circuit opinion (App. A) is a non-published opinion. The order (App. B) entered by Patricia C. Fawsett, United States District Judge of the Federal District Court for the Middle District of Florida, Orlando Division, is non-published.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on June 26, 2000.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment and 42 U.S.C. § 1983.

The Fourth Amendment states in pertinent part as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment states in pertinent part as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 489.127, Florida Statutes, provides in pertinent part as follows:

> (1) No person shall:
>
> (f) Engage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority.

STATEMENT OF THE CASE

During June through August 1994, the Florida Department of Business and Professional Regulation and the Office of the State Attorney conducted a criminal investigation and "sting" operation entitled "Operation Handyman." Bustamante, who was an assistant state attorney, assisted the operation as legal adviser.

(a) Operation Handyman.

The purpose of "Operation Handyman" was to investigate individuals who were potentially operating as or performing the work of contractors licensed under Florida Statutes without possession of such license as required by Florida Statutes.

DuPont was targeted as a suspect in the investigation after he placed an ad on June 8, 1994 in a local advertising tabloid, *The Daytona PENNYSAVER*. The advertisement began with the heading "DuPont Painting," and then listed services offered to include: "Roof and concrete pressure cleaning; acoustic ceilings, spray painting, brush and rolling; staining and varnishing. We do it all. Handywork done also." The advertisement made no offer of contracting services nor advertised DuPont as a licensed contractor.

The operation attempted to bait DuPont into committing a violation of the statute using a decoy posing as a homeowner. The decoy telephoned DuPont in response to his ad and asked him for a painting estimate. On three different occasions, on July 19, July 21 and July 24 1994, the decoy asked DuPont to agree to perform contracting services for which he was unlicensed. In each instance, DuPont firmly and clearly declined to do so.

Despite the lack of evidence, Bustamante assisted the investigation in procuring an arrest warrant against DuPont. The purpose of the warrant was to successfully conclude the investigation of DuPont by arresting him.

An investigator prepared a sworn complaint affidavit. The probable cause statement in the affidavit made only a bare, unsupported allegation that "on the 8 day of June 1994 the defendant within Volusia County, violated the law and did then and there advertise as a licensed contractor, as described in FS 489.105(3) without being so licensed." The affidavit did not contain any facts or refer to any evidence to support the bare, unsupported allegation.

Bustamante obtained the arrest warrant in accordance with local practice and custom, by submitting the investigator's sworn affidavit and signing the proposed warrant as the person requesting the warrant.

In accordance with local practice and custom of the Volusia County Circuit Courts, by preparing the proposed warrant and signing his name as the person requesting the warrant and forwarding the complaint affidavit, Bustamante represented to the magistrate under the authority of his office of Assistant State Attorney and as an officer of the court, under penalty of discipline by the Florida Bar and the State Attorney for any misrepresentation or impropriety, that Bustamante had reviewed and had personal knowledge of the evidence submitted with the proposed warrant, was vouching for the accuracy and reliability of the evidence against DuPont and represented that there was probable cause justifying the execution of an arrest warrant against DuPont.

Bustamante then directed a SAO investigator to deliver the proposed warrant and the complaint affidavit to a Volusia County Circuit Judge, acting as magistrate, for approval and execution.

On August 8, 1994, in accordance with local practice and custom of the Volusia County Circuit Courts, the magistrate relied upon such representations by Bustamante and executed the arrest warrant against DuPont.

In applying for the arrest warrant, Bustamante did not appear in court or before the magistrate nor did he make any motion or present argument or otherwise act in the role of an advocate in a judicial proceeding.

On the date Bustamante obtained the arrest warrant, no judicial proceedings or motions had been commenced or filed against DuPont. The warrant was obtained a month and a half before any charge was filed against DuPont.

Judicial proceedings were not commenced against DuPont until September 20, 1994 (1½ months after his arrest), when an information was filed charging DuPont for violation of § 489.127(1)(f), Fla. Stat.

The judge at trial dismissed the charge against DuPont after the presentation of the state's case.

(b) Basis of jurisdiction in district court below.

DuPont brought this case in United States District Court, Middle District of Florida, Orlando Division under 42 U.S.C. § 1983 for violation of his fourth amendment civil rights. The district court had subject matter jurisdiction of this case under 28 U.S.C. §§ 1331 and 1343(3).

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT OPINION CONFLICTS WITH AN EIGHTH CIRCUIT DECISION ON THE SAME IMPORTANT QUESTION OF FEDERAL LAW.

When a prosecutor acts as legal adviser to a criminal investigation and procures an arrest warrant against a suspect of the investigation by presenting a judge with an investigator's sworn affidavit and by personally vouching for the truth of the facts alleged in the affidavit, is he shielded from §1983 liability by absolute immunity?

In this case, the Eleventh Circuit answered the above question in the affirmative. Under its precedent, however, the Eighth Circuit would have reached the opposite conclusion.

The Eleventh Circuit applied *Kalina v. Fletcher*, 118 S. Ct. 502 (1997) to hold in this case that Bustamante's actions, presenting a judge with an investigator's sworn affidavit and personally vouching for the truth of the facts alleged in the affidavit, were within the protective scope of absolute immunity. The reasoning of the court of appeals was as follows:

> "In *Kalina*... When the prosecutor executed the Certification [for Determination of Probable Cause] 'under penalty of perjury,' the prosecutor performed an act that any competent witness might have performed: testifying about facts is the function of a witness, not the function of an advocate. *Id.* at 509-510.

> DuPont's amended complaint does not allege that Bustamante vouched, under penalty of perjury, for the facts presented in support of the request for an arrest warrant. While DuPont seeks to characterize Bustamante's function as that of a "complaining witness," Bustamante did not provide his own sworn factual statement under penalty of perjury. The facts alleged show that Bustamante functioned as an advocate when he prepared a proposed arrest warrant, signed his name as the person requesting the warrant, and forwarded the investigator's complaint affidavit to the magistrate for approval and execution. As such, the doctrine of absolute prosecutorial immunity applied." (Underline added.)

Under the above decision, Bustamante's act of "personally vouching for the truth" of the facts provided in the investigator's sworn affidavit is distinguishable from the *Kalina* prosecutor's act of "vouching under penalty of perjury" for the truth of his own sworn affidavit.

The above distinction, however, places the Eleventh Circuit's opinion in this case in conflict with another United States court of appeals decision on the same issue.

The opinion in this case is at odds with the Eighth Circuit's decision in *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993). The pertinent facts in *Kohl* are almost identical to those in this case: A prosecutor, Casson, presented a police officer's sworn affidavit to a county clerk-magistrate and "vouched for the truth" of the matters provided in the affidavit in order to obtain an arrest warrant against Kohl.

Although the facts were similar to this case, the Eighth Circuit reached a different conclusion than the Eleventh Circuit. The court of appeals in *Kohl* held that the

above-described actions by Casson were not within the scope of absolute immunity protection from § 1983 liability

The excerpts from the *Kohl* opinion describing the facts that are relevant to this discussion are as follows:

> "Siebe conferred with County Attorney Casson, obtaining advice on the affidavit for Kohl's arrest warrant... Siebe then prepared and signed the affidavit, which Kohl has incorporated by reference in his complaint. Siebe, accompanied by Casson, took the warrant to the Jefferson County Clerk-Magistrate, who issued a warrant for Kohl's arrest." *Id.* at 1144.
>
> * * *
>
> "Kohl alleges that... Casson advised Siebe on preparing an affidavit for the issuance of Kohl's arrest warrant and then, together with Siebe, presented the affidavit as true and sufficient to the Jefferson County Clerk-Magistrate." Id. at 1145.

The provisions of the *Kohl* decision that conflict with the court of appeals decision in this case are as follows:

> "To the extent... that Casson then presented the affidavit [of the police officer] as true to the clerk-magistrate, we must determine whether such conduct enjoys qualified immunity, because the Supreme Court has held that those functions fall outside the scope of absolute immunity." *Id.* at 1146.
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> * * *
>
> "Because Kohl alleges that Casson was performing in essence the function of seeking an arrest warrant, the test of qualified immunity is the same [as that applied to

police officers seeking arrest warrants.]. *Id.* at 1146-1147.

The conflict between the Eleventh Circuit's decision in this case and the Eighth Circuit's opinion in *Kohl*, is not reconcilable. In this case, Bustamante is protected by absolute immunity when presenting the investigator's sworn affidavit to the judge and vouching for the truth of the matters in the affidavit. In *Kohl*, the prosecutor was not protected by absolute immunity for taking the same action.

II.

THE ELEVENTH CIRCUIT OPINION HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT SUPREME COURT DECISIONS.

The Eighth Circuit's decision in *Kohl* was decided under the principles stated in *Malley v. Briggs*, 475 U.S. 335 (1986), where the Supreme Court held that an officer is not protected by absolute immunity for the function of procuring an arrest warrant. Under the functional analysis employed by the Supreme Court to determine the scope of immunity, *Malley* is also applicable to this case even though Bustamante is a prosecutor and not a police officer.

The Eleventh Circuit based its decision in this case upon *Kalina*. Although *Kalina* addressed the application of immunity to the actions of a prosecutor in obtaining an arrest warrant, the facts were much different than those in this case. In *Kalina*, the prosecutor was requesting the arrest warrant simultaneously with the filing of criminal charges. In this case, Bustamante was assisting an ongoing criminal investigation when he requested the arrest warrant. The warrant request was not related to the filing of a criminal charge against DuPont. The charge against DuPont, which was dismissed by the court for the lack of evidence, was not

filed until 1 ½ months after Bustamante requested the arrest warrant.

The Eleventh Circuit has expanded the application of *Kalina* to circumstances that are beyond the scope of the decision. The decision in this case essentially provides a prosecutor with absolute immunity for procuring an arrest warrant in any manner except when the prosecutor submits his or her own sworn affidavit under penalty of perjury.

The decision in this case does not square with the functional approach to immunity provided in *Malley*. It provides a wider scope of immunity protection to prosecutors because of their "status" as prosecutors.

This conflict between the court of appeals decision in this case and *Malley* can be illustrated by example. Under the court of appeals decision in this case, Bustamante was protected by absolute immunity for requesting the arrest warrant. But what if a police officer participating in Operation Handyman had presented the investigator's sworn affidavit instead? Under *Malley*, the police officer would not be protected by absolute immunity for his actions. Therefore, the decision in this case conflicts with *Malley* because it provides immunity to a prosecutor based upon their status and not their function.

III.

THE ELEVENTH CIRCUIT OPINION DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The previous discussion regarding the conflict between the Eleventh Circuit's decision in this case and the Eighth Circuit's decision in *Kohl* and the effective conflict between the decision in this case and *Malley* demonstrates

the need for the Supreme Court to clarify the application of immunity protection in this case.

Finally, granting the petition for a writ of certiorari would provide an opportunity for the Supreme Court to assist the lower courts in discerning the boundaries between the prosecutor in his role as advocate and the prosecutor in his role of administrator or investigator. *See e.g. Imbler v. Pachtman,* 96 S. Ct. 84 (1976)) and *Buckley v. Fitzsimmons,* 113 S. Ct. 2606 (1993). This case would provide an opportunity for the Supreme Court to guide prosecutors and the courts regarding the scope of immunity for a prosecutor who applies for an arrest warrant or search warrant prior to filing a criminal charge.

Conclusion

For the above reasons, the petition for a writ of certiorari should be granted

Respectfully submitted,

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APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10323
Non-Argument Calendar

D. C. Docket No. 98-00041-CV-ORL-19A

MICHAEL C. DUPONT,

Plaintiff-Appellant,

versus

SEBASTIAN TANGUSSO,
LUIS C. BUSTAMANTE,
JOHN DOE,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 26, 2000)

Before ANDERSON, Chief Judge, EDMONDSON and DUBINA, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Michael C. DuPont appeals the dismissal of his section 1983 complaint for failure to state a claim against Defendant-Appellee Luis Bustamante, a prosecutor for the State of Florida. The dismissal was based on absolute prosecutorial immunity and qualified immunity.[1]No reversible error has been shown; we affirm.

DuPont ran an advertisement on 8 June 1994 in The Daytona PENNYSAVOR. The advertisement began with the heading "DuPont Painting," and then listed services offered to include: "Roof and concrete pressure cleaning; acoustic ceilings, spray painting, brush and rolling: staining and varnishing. We do it all. Handywork done also." The advertisement included no reference to DuPont as a licensed contractor.

Based on this advertisement, DuPont claims he was targeted as a suspect in a sting operation known as "Operation Handyman. " Operation Handyman sought to catch individuals who were operating as roofing contractors or advertising themselves as available to perform contracting services without being duly registered or certified, in violation of section 489.127(1)(f), Florida Statutes.2 On or about 14 July 1994, an investigator

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[1] DuPont's complaint asserted claims against additional parties. The district court granted DuPont's Rule 54(b) motion for certification of dismissal of his claims against Bustamante.

[2] Section 499.127, Florida Statutes, provides in pertinent part:

> (1) No person shall:
>
> . . .
>
> (2) Engage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority.

employed by the Florida Department of Business and Professional Regulation, swore out a complaint affidavit averring that DuPont violated section 489.127, Florida Statutes, by advertising as a licensed roofing contractor without being so licensed. DuPont further alleges that Operation Handyman baited him to agree to perform contracting services for which he was unlicensed on 19 July, 21 July and 24 July 1994; on each of these dates DuPont refused to perform work for which he was unlicensed.

DuPont claims that despite his refusal to perform work for which he was not licensed and despite that the advertisement made no offer of contracting services or advertised DuPont as a licensed contractor, Bustamante sought the issuance of an arrest warrant against DuPont on 8 August 1994. DuPont alleges further that -- in accordance with local practice and custom, by preparing the proposed arrest warrant and forwarding the investigator's complaint affidavit -- Bustamante represented to the magistrate that he "had personal knowledge of the evidence submitted with the proposed warrant, was vouching for the accuracy and reliability of the evidence against DuPont and represented that there was probable cause justifying the execution of an arrest warrant against DuPont. " DuPont was arrested on 10 August 1 994.3

DuPont contends that no probable cause existed for Bustamante to believe that DuPont had violated section 489.127, Florida Statutes, when the arrest warrant was requested, and that no reasonably competent officer could conclude that an arrest warrant should issue against him. The investigator's probable cause statement in the affidavit used to support issuance of the arrest warrant consisted of an unsupported allegation that DuPont violated the law by advertising as a licensed contractor without being so

[3] DuPont was charged with a violation of Section 489.127(1)(f), Florida Statutes, but the charge was dismissed at trial after presentation of the State's case.

licensed. DuPont argues that Bustamante's acts caused the violation of his Fourth Amendment right against arrest without probable cause.

The district court granted Bustamante's motion to dismiss, concluding that Bustamante's acts in seeking an arrest warrant were protected by the doctrine of absolute prosecutorial immunity.[4] DuPont, citing Malley v. Briggs, 106 S.Ct. 1092 (1986), argues that Bustamante's acts in procuring the arrest warrant were akin to those of a police officer seeking a warrant based upon his own affidavit. Malley held that qualified immunity -- not absolute immunity -- shields a police officer applying for an arrest warrant from § 1983 liability for damages. Because Bustamante did not appear before the magistrate judge or otherwise act in the role of an advocate in a juridical proceeding, DuPont contends Bustamante was acting as a "complaining witness" who enjoys only qualified immunity under Malley.

We review de novo the district court's order granting a defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim. See Long v. Satz, 181 F.3d 1275, 1278 (11th Cir. 1999). At this stage in the proceedings, we accept as true the allegations of the complaint and draw all reasonable inferences in the plaintiff's favor. Id.

In Imbler v. Pachtman, 96 S.Ct. 984, 985 (1976), the Supreme Court concluded that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution" was immune to suit under section 1983. In Kalina v. Fletcher, 118 S.Ct. 502 (1997), the Supreme Court addressed the immunity enjoyed by a

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[4] The district court also determined that the doctrine of qualified immunity protected Bustamante from claims that legal advice he gave to Project Handyman violated DuPont's constitutional rights. In seeking Rule .54(b) certification, DuPont made no reference to the district court's qualified immunity decision; and his brief on appeal addresses only the issue of absolute prosecutorial immunity

prosecutor who commenced criminal proceedings by filing (i) an information charging burglary; (ii) a motion for an arrest warrant; and (iii) a Certification for Determination of Probable Cause which summarized the evidence supporting the charge. The first two documents were unsworn pleadings; the third was the prosecutor's sworn statement, under penalty of perjury, personally vouching for the facts establishing the grounds for the warrant. See id at 505.

In Kalina, the Supreme Court said that case law made it clear that the prosecutor's acts in connection with the preparation and filing of the information and arrest warrant were part of the advocate's function and protected by absolute immunity. Id. at 509. So too, were the acts in preparing and filing the Certification, except for the prosecutor's personal attestation to the truth of the facts therein. Id. When the prosecutor executed the Certification "under penalty of perjury," the prosecutor performed an act that any competent witness might have performed: testifying about facts is the function of a witness, not the function of an advocate. Id. at 509-510.

DuPont's amended complaint does not allege that Bustamante vouched, under penalty of perjury, for the facts presented in support of the request for an arrest warrant. While DuPont seeks to characterize Bustamante's function as that of a "complaining witness," Bustamante did not provide his own sworn factual statement under penalty of perjury. The facts alleged show that Bustamante functioned as an advocate when he prepared a proposed arrest warrant, signed his name as the person requesting the warrant, and forwarded the investigator's complaint affidavit to the magistrate for approval and execution. As such, the doctrine of absolute prosecutorial immunity applied.

DuPont argues that no judicial proceedings or motion had commenced when the arrest warrant was requested, and Bustamante did not appear before the magistrate or otherwise act in the role of an advocate. But,

"the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of prosecution." Imbler, 96 S.Ct. at 996 n.3. While Imbler did not draw precise boundaries between the prosecutor in his role as advocate and the prosecutor in his role as administrator or investigator, "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." Buckley v. Fitzsimmons, 113 S.Ct. 2606, 2615 (1993); see also, Kohl v. Casson, 5 F.3d 1141, 1146 (8th Cir. 1993) ("seeking an arrest warrant often constitutes the first step in a prosecution").

The defense of absolute prosecutorial immunity was applied properly by the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL C. DUPONT,

Plaintiff,

v. CASE NO. 98-41-CIV-ORL-19A

SEBASTIAN TANGUSSO, LUIS BUSTAMANTE, JANE ROE AND JOHN DOE,
Defendants.

_____/

ORDER

This cause came before the Court on Defendants' Motion to Dismiss First Amended Complaint and Demand For Jury Trial (Doc. No. 16, filed June 4, 1998) and Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss First Amended Complaint (Doc. No. 23, filed July 20, 1998).

BACKGROUND

Plaintiff Michael C. DuPont brings this action pursuant to 42 U.S.C. § 1983 against Defendants Sebastian Tangusso, Luis Bustamante, Jane Roe, and John Doe for violation of his rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. The First Amended Complaint states the following facts. During June and July 1994, while acting as an investigator for the Department of Business and Professional Regulation ("DBPR"), Tangusso allegedly participated in a criminal investigation in conjunction with a "sting" operation conducted by the Office of the State Attorney, Seventh Judicial Circuit. Tangusso allegedly caused Plaintiff to be

targeted as a suspect in the sting operation for purportedly operating as a roofing contractor and advertising as a licensed roofing contractor in violation of section 489.127(1)(f), Florida Statutes.[1] Plaintiff maintains that Tangusso filed a Uniform Complaint Form and an Investigative Report with DBPR and forwarded a copy of the Investigative Report to the office of the State Attorney.

The advertisement by Plaintiff that was purportedly targeted by the sting was a June 8, 1994 advertisement in the Daytona Pennysaver. Plaintiff contends that the advertisement neither offered contracting services nor advertised Plaintiff as a licensed contractor. On or about July 14, 1994, even though the advertisement by Plaintiff that was the subject of the investigation allegedly made no offer of contracting services and did not advertise Plaintiff as a licensed contractor, Tangusso swore a complaint affidavit against Plaintiff; the affidavit averred that, on June 8, 1994, Plaintiff violated section 489.127, Florida Statutes, by advertising as a licensed roofing contractor without being so licensed.

In July, as part of the sting operation, Defendant Roe, who has not yet been identified by Plaintiff, allegedly telephoned Plaintiff posing as a homeowner under the pretext of receiving estimates and arranged an appointment for Plaintiff to visit her home. During the telephone conversations and the appointment, Roe purportedly unsuccessfully attempted to bait Plaintiff into offering to perform contracting services for which he was unlicensed.

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[1] Section 489.127 provides in pertinent part:

(1) No person shall:

. . .

(f) Engage in the business or act in the capacity of a contractor or advertise himself or herself or a business organization as available to engage in the business or act in the capacity of a contractor without being duly registered or certified or having a certificate of authority . . . .

Fla. Stat. § 489.127(l) (f).

During the relevant period, Bustamante was employed as an Assistant State Attorney in the Office of the State Attorney. Bustamante allegedly participated in the investigation of Plaintiff and provided legal advice to the participants in the investigation.

On or before August 8, 1994, Bustamante submitted the investigative affidavit of Tangusso, along with a request for an arrest warrant, which Bustamante signed, to a Volusia County Judge, who signed a misdemeanor arrest warrant. In accordance with local practice and custom of the Volusia County Circuit Courts, by preparing the proposed warrant and signing his name as the person requesting the warrant and forwarding the complaint affidavit, Bustamante allegedly represented to the magistrate that he had reviewed and had personal knowledge of the evidence submitted with the proposed warrant, was vouching for the accuracy and reliability of the evidence against Plaintiff, and represented that there was probable cause justifying the execution of an arrest warrant against Plaintiff. In applying for the arrest warrant, Bustamante allegedly did not appear before the magistrate, make any motion, or present legal argument.

As of the date of Bustamante's application for the arrest warrant, no judicial proceedings or motions had been commenced or filed against Plaintiff. Judicial proceedings were not commenced against Plaintiff until a month and a half after the application for the warrant.

On August 10, 1994, Roe allegedly telephoned Plaintiff again and asked him to meet her at her home to discuss the painting estimate. When Plaintiff entered the home, he was allegedly "jumped" by undercover officers, arrested on the warrant, and taken into custody against his will. Plaintiff contends that, for unknown reasons, he was arrested a second time on the warrant, in the presence of his child, at a subsequent court appearance.

On September 20, 1994, Plaintiff was charged with violation of Section 489.127(1) (f) . The charge was eventually dismissed at trial after presentation of the State's case.

Plaintiff contends that there was no probable cause to believe that he had violated Section 489.127 and that, based upon the information available to Tangusso and Bustamante prior to requesting the warrant, no reasonably competent officer would have concluded that an arrest warrant should issue against Plaintiff. Plaintiff asserts that Tangusso and Bustamante, while acting under color of state law and the authority of DBPR and the Office of the State Attorney, caused Plaintiff to be subjected to the deprivation of rights secured to him by the Constitution and the laws of the United States, including but not limited to, his Fourth Amendment right to be free from unreasonable seizure of his person, his right to bodily security, and his right to be free of a deprivation of liberty.

LEGAL ANALYSIS

For purposes of a motion to dismiss, this Court must view the allegations of the First Amended Complaint in the light most favorable to the Plaintiff, consider the allegations of the First Amended Complaint as true, and accept all reasonable inferences therefrom. Jackson v. Okaloosa County, Florida, 21 F.3d 1531, 1534 (11th Cir. 1994); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Furthermore, this Court must limit its consideration to the pleadings and written instruments attached as exhibits thereto. See Fed. R. Civ. Pro. 10(c); GSW, Inc. v. Long County, Ga., 999 F.2d 1508, 1510 (11th Cir. 1993). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hunnings v. Texaco, Inc., 29 F.3d 1480, 1483 (11th Cir. 1994). Conclusory allegations and unwarranted factual deductions are not accepted as true. Gersten v. Rundle, 833 F. Supp. 906,

910 (S.D. Fla. 1993) (citing Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974)).

A. Defendant Bustamante

Defendant Bustamante contends that he is entitled to both absolute and qualified immunity. After a careful examination of the allegations in the First Amended Complaint and the relevant case law, the Court finds that Bustamante is protected by absolute immunity for his actions in requesting the arrest warrant and that he is protected by qualified immunity for providing legal advice to the participants in the investigation.

A prosecutor is protected by absolute immunity when performing the traditional functions of an advocate. See Kalina v. Fletcher, 118 S. Ct. 502, 509 (1997). However, in determining immunity, the Court examines "the nature of the function performed, not the identity of the actor who performed it." See id. at 508 (quoting Forrester v. White, 484 U.S. 219, 229 (1988).

In Kalina, the United States Supreme Court held that a prosecutor was protected by absolute immunity when she filed a motion for an arrest warrant. See id. at 509. Other courts have also found that prosecutors were protected by absolute immunity for their requests for arrest warrants. See e.g. Kohl v. Casson, 5 F.3d 1141, 1146 (8th Cir. 1993); Sheehan v. Colangelo, 1998 WL 758450, *2 (D. Conn. Oct. 26, 1998). However, in Kalina, the Supreme Court held that the prosecutor was not protected by absolute immunity when she personally vouched under penalty of perjury for the truth of facts set forth in a "Certification for Determination of Probable Cause." See id. at 510. The Court held that the prosecutor was not protected when she made the certification because she was performing the role of a complaining witness rather than the role of an advocate. See id.

In another case, the Supreme Court held that a police officer was not protected with absolute immunity when the officer caused an unconstitutional arrest by presenting a judge with a complaint and supporting affidavit that failed to establish probable cause. See Malley v. Briggs, 475 U.S. 335, 340-44 (1986). The police officer in Malley argued that he was absolutely immune because his function in seeking an arrest warrant was similar to that of a complaining witness. See id. at 340. The Supreme Court rejected this argument because it found that complaining witnesses were not absolutely immune at common law. See id. at 340-41.

Plaintiff contends that Bustamante is not protected by absolute immunity for requesting the arrest warrant because Bustamante was acting as a complaining witness rather than a prosecutor when he made the request. However, contrary to Plaintiff's contention, the First Amended Complaint does not allege facts that could establish that Bustamante was performing the function of a complaining witness because it does not allege that Bustamante vouched, under penalty of perjury, for the facts presented in support of his request for an arrest warrant. Cf. Kalina, 118 S.Ct. at 510 (explaining that the prosecutor performed the function of a complaining witness when she provided sworn testimony). In both Kalina and Malley, the individuals requesting warrants had provided their own sworn statements. See id. at 505; Malley, 475 U.S. at 338; see also Kohl, 5 F.3d at 1146 (",[t]he [Supreme] Court's holding in Malley . . . dealt with . . . vouching for the truth of the contents of the complaint that 'causes the warrant to issue.'").

Plaintiff next contends that Bustamante was not acting as an advocate when he requested the warrant because judicial proceedings had not commenced against the Plaintiff at the time he made the request. The First Amended Complaint alleges that an information was not filed against the Plaintiff until a month and a half after the request for the warrant. However, contrary to Plaintiff Is assertion, "seeking

an arrest warrant often constitutes the first step in a prosecution." Kohl, 5 F.3d at 1146. Furthermore, a prosecutor is protected for actions taken in his or her role as an advocate prior to the commencement of judicial proceedings. See Burns v. Reed, 500 U.S. 478, 491 (1991) (quoting Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976)) ("the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution") Thus, Bustamante is protected by absolute immunity for the actions he took in requesting the arrest warrant even though an information had not been filed-at that time. See Kohl, 5 F.3d at 1144, 46.

Finally, the First Amended Complaint alleges that Bustamante provided legal advice to the participants in the investigation. A prosecutor is not protected by absolute immunity for giving legal advice during the course of an investigation. See Burns, 500 U.S. 492-96. However, a prosecutor is protected by qualified immunity for providing such advice. See id. at 496, Davis v. Ziralbach, 149 F.3d 614, 617 (7th Cir. 1998); Schlosser v. Coleman, 818 F.Supp. 1534, 1539 (M.D. Fla. 1993).

The doctrine of qualified immunity protects a government official as long as he or she acts within the scope of his or her discretionary authority and does not violate clearly established law. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The courts apply a two-part analysis to a government official's assertion of qualified immunity. First, the official must prove that the alleged unconstitutional conduct occurred while he or she was acting within the scope of his other discretionary authority. See e.g. Evans v. Hightower, 117 F.3d 1318, 1320 (11th Cir.1997). Second, if the official meets that burden, the plaintiff must prove that the official's conduct violated clearly established law. See id. The Eleventh Circuit requires some factual detail in the pleading of 42 U.S.C. § 1983 claims that involve qualified

immunity. See GJR Investments, Inc. v. County of Escambia Florida, 132 F.3d 1359, 1367 (11th Cir. 1998).

In this case, the allegations in the First Amended Complaint show that Bustamante was acting within the scope of his authority when he provided legal advice to the participants in the investigation. Thus, the burden is on the Plaintiff to allege that Bustamante violated clearly established law. Plaintiff has not met this burden. Even when viewed in a light most favorable to the Plaintiff, the allegation that Bustamante provided legal advice to the investigators does not show Bustamante violated clearly established law. The First Amended Complaint fails to specify what legal advice Bustamante provided to the participants in the investigation. Thus, it appears Bustamante is protected by qualified immunity for providing legal advice to the investigators.

B. Defendant Tangusso

The Court denied a motion to dismiss by Defendant Tangusso in the Court's April 29, 1998 Order (Doc. No. 12, filed April 29, 1998). Tangusso has raised the same claims in the Motion to -Dismiss that is before the Court. The Court denies Defendant Tangusso's Motion to Dismiss for the reasons stated in the April 29, 1998 Order.

CONCLUSION

Based on the foregoing, Defendants' Motion To Dismiss (Doc. No. 16) is GRANTED IN PART AND DENIED IN PART in accordance with this Order. Plaintiff shall have ten (10) days from the date of this Order to file a second amended complaint. Failure to file timely a second amended complaint will result in dismissal with prejudice of claims against Luis Bustamante as a defendant to this action.

DONE AND ORDERED at Orlando, Florida this 20th day of January, 1999.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL C. DuPONT,

Plaintiff,

v. Case No: 98-41-CIV-ORL-19A

SEBASTIAN TANGUSSO,
LUIS BUSTAMANTE,
JANE ROE and JOHN DOE,

Defendants.
_____/

FIRST AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL

Plaintiff, Michael C. DuPont ("DuPont"), sues defendants, Sebastian Tangusso ("Tangusso"), Luis Bustamante ("Bustamante"), Jane Roe ("Roe") and John Doe ("Doe") and alleges as follows:

General Allegations

1. This is an action under 42 U.S.C. § 1983 and the fourth and fourteenth amendments to the Constitution of the United States.

2. This court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343.

3. This district is a proper venue for this action under 28 U.S.C. § 139(b).

4. DuPont is a United States citizen and a resident of South Daytona, Volusia County, Florida.

5. At all times relevant to this action, Tangusso was employed as an investigator for the State of Florida,

Department of Business and Professional Regulation ("DBPR") and is a resident of the State of Florida.

6. At all times relevant to this action, Bustamante was a resident of Volusia County, Florida and employed as an Assistant State Attorney, in the Office of the State Attorney, Seventh Judicial Circuit ("SAO").

7. DuPont has been unable to ascertain the identity and employment of Roe through public records requests or private investigation, but will be able to ascertain such information from defendants through discovery.

8. DuPont has been unable to ascertain the identities and employment of Doe through public records requests or private investigation, but will be able to ascertain such information from defendants through discovery.

9. A substantial part of the events or omissions giving rise to the claim alleged herein occurred in Volusia County, Florida.

10. During June, July and August 1994, DBPR and SAO conducted a "sting" operation entitled "Operation Handyman." The purpose of this operation was to investigate individuals who were potentially operating as or performing the work of contractors licensed under Florida Statutes without possession of such license as required by Florida Statutes.

11. DuPont was targeted as a suspect in Operation Handyman for allegedly operating as a roofing contractor and advertising as a licensed roofing contractor in violation of § 489.127(1)(f), Fla. Stat.

12. The investigation targeted an advertisement by DuPont that ran in the Daytona Pennysaver on June 8, 1994. The advertisement, which is attached hereto as Exhibit "A," made no offer of contracting services nor advertised DuPont as a licensed contractor.

13. As part of Operation Handyman, Roe, posing as a homeowner, telephoned DuPont on or about July 19, 1994 and asked him for a painting estimate. Roe attempted to bait DuPont into offering or agreeing to perform contracting services for which he was unlicensed, but DuPont firmly and clearly declined to do so.

14. Roe arranged an appointment for DuPont to visit the home for an estimate on or about July 21, 1994. During the appointment, Roe again attempted to bait DuPont into offering or agreeing to perform contracting services for which he was unlicensed, but DuPont firmly and clearly declined to do so.

15. Roe telephoned DuPont again on July 24, 1994 and for a third time attempted to bait DuPont into offering or agreeing to perform contracting services for which he was unlicensed, but DuPont firmly and clearly declined to do so.

16. Despite DuPont's repeated and firm rejections of Roe's efforts to entrap him on July 19, July 21 and July 24, 1994 and the fact that the June 8, 1994 advertisement made no offer of contracting services nor advertised DuPont as a licensed contractor, the investigators applied for and obtained an arrest warrant against DuPont on August 8, 1994.

17. Following the receipt of the arrest warrant and as a continuation of the sting operation, Roe telephoned DuPont one more time and asked him to meet her at the home on August 10, 1994 to discuss the painting estimate. When DuPont entered the home, he was jumped by undercover officers, was arrested under the warrant and was taken into custody against his will.

18. There was no probable cause for any of the investigators, officers or attorneys participating in Operation Handyman to believe DuPont had violated § 489.127, Fla. Stat., and based upon the information available to them, no

reasonably competent investigator, officer or attorney would have concluded that an arrest warrant should issue against DuPont or that DuPont should be arrested.

19. At the time of DuPont's arrest, no criminal charges or judicial proceedings had been filed or commenced against him.

20. For unknown reasons, DuPont was arrested a second time on the warrant in the presence of his child at a subsequent court appearance.

21. A month and a half after the issuance of the arrest warrant and the actual arrest, DuPont was charged with violation of § 489.127(1)(f), Fla. Stat., the crime of contracting or advertising as a licensed contractor without possessing such license. The judge at trial dismissed the charge after the presentation of the state's case.

22. As a proximate result of the above-described actions of investigators, officers and attorneys participating in Operation Handyman, DuPont was deprived of his constitutional rights, suffered physical injury, his reputation has been greatly injured and he has been brought into public scandal, disrepute and disgrace and has been greatly hindered and prevented from following and transacting his affairs and business and has suffered great emotional trauma and harm, all to his damage. These losses are permanent and continuing in nature and DuPont will suffer these losses in the future.

23. DuPont is obligated to pay his attorney a reasonable fee for his services.

Count I- Tangusso

24. DuPont re-alleges and incorporates herein the allegations in paragraphs 1-23.

25. During June, July and August 1994, while acting in his position as investigator for DBPR, Tangusso participated in "Operation Handyman."

26. As part of the operation, Tangusso filed a Uniform Complaint Form against DuPont and an Investigative Report with DBPR and forwarded a copy of the Investigative Report to the Office of the State Attorney. The DBPR investigation was assigned case number CC9411038.

27. On or about July 14, 1994, even though the advertisement by DuPont that was the subject of the investigation made no offer of contracting services nor advertised DuPont as a licensed contractor, Tangusso swore a complaint affidavit against DuPont.

28. The probable cause statement in the affidavit made only a bare, unsupported allegation that "on the 8 day of June 1994 the defendant within Volusia County, violated the law and did then and there advertise as a licensed contractor, as described in FS 489.105(3) without being so licensed."

29. Tangusso's affidavit did not contain any facts or refer to any evidence to support the bare, unsupported allegation.

30. The arrest of DuPont without probable cause was a direct and proximate result of the actions and complaint affidavit of Tangusso.

31. Through his actions in the above-described course of events, Tangusso, under color of § 489.127, Fla. Stat., and under the color of the authority of the DBPR and SAO, caused DuPont to be subjected to the deprivation of rights secured to him by the Constitution and laws of the United States, including, but not limited to, his fourth amendment right to be free from unreasonable seizure of his person, his rights to bodily security and to be free of a deprivation of liberty.

WHEREFORE, DuPont demands judgment for damages, attorney's fees and costs against Tangusso and demands a trial by jury on all issues so triable.

Count II- Bustamante

32. DuPont re-alleges and incorporates herein the allegations in paragraphs 1-23.

33. Bustamante participated in the investigation of DuPont and provided legal advice to the participants of Operation Handyman.

34. Despite the lack of evidence, Bustamante stepped up the investigative efforts against DuPont by seeking the issuance of an arrest warrant against him.

35. On or before August 8, 1994, in accordance with local practice and custom of the Volusia County Circuit Courts for law enforcement officers to request an arrest warrant, Bustamante prepared a proposed arrest warrant and signed his name to the warrant as the person requesting the warrant. Bustamante then directed a SAO investigator to deliver the proposed warrant and the complaint affidavit to a Volusia County Circuit Judge, acting as magistrate, for approval and execution.

36. In accordance with local practice and custom of the Volusia County Circuit Courts, by preparing the proposed warrant and signing his name as the person requesting the warrant and forwarding the complaint affidavit, Bustamante represented to the magistrate under the authority of his office of Assistant State Attorney and as an officer of the court, under penalty of discipline by the Florida Bar and the State Attorney for any misrepresentation or impropriety, that Bustamante had reviewed and had personal knowledge of the evidence submitted with the proposed warrant, was vouching for the accuracy and reliability of the evidence against DuPont and represented that there was probable cause justifying the execution of an arrest warrant against DuPont.

37. On August 8, 1994, in accordance with local practice and custom of the Volusia County Circuit Courts,

the magistrate relied upon such representations by Bustamante and executed the arrest warrant against DuPont.

38. Bustamante's actions and representations to the magistrate as described above were comparable to the traditional role of the "complaining witness" or investigator and his actions were equivalent to a police officer applying to a magistrate for issuance of an arrest warrant.

39. The application for the arrest warrant against DuPont on August 8, 1994 was a part of the ongoing criminal investigation of DuPont by Operation Handyman and the purpose of the warrant was to assist the investigation by allowing the officers to arrest DuPont on August 10, 1994.

40. The reason the investigators wanted the arrest warrant was obvious: DuPont had refused Roe's two (2) previous attempts to entrap him; therefore, the warrant was necessary to successfully conclude the investigation of DuPont by arresting him.

41. On August 8, 1994, the date of Bustamante's application for the arrest warrant, no judicial proceedings or motions had been commenced or filed against DuPont. Judicial proceedings were not commenced against DuPont until September 20, 1994 (almost 1½ months after his arrest), when an information was filed charging DuPont for violation of § 489.127(1)(f), Fla. Stat.

42. In applying for the arrest warrant, Bustamante did not appear in court or before the magistrate nor did he make any motion or present argument or otherwise act in the role of an advocate in a judicial proceeding.

43. In applying for the arrest warrant, Bustamante was acting in the role of legal adviser to the criminal investigation and in the role of complaining witness.

44. In applying for the arrest warrant, Bustamante followed the same procedure that would be followed if the request for arrest warrant had been made by a police officer.

45. There was no probable cause for Bustamante to believe DuPont had violated § 489.127, Fla. Stat., and based upon the information available to Bustamante prior to requesting the warrant, no reasonably competent officer would have concluded that an arrest warrant should issue against DuPont.

46. Through his actions in the above-described course of events, Bustamante, under color of § 489.127, Fla. Stat., and under the color of the authority of the DBPR and SAO, caused DuPont to be subjected to the deprivation of rights secured to him by the Constitution and laws of the United States, including, but not limited to, his fourth amendment right to be free from unreasonable seizure of his person, his rights to bodily security and to be free of a deprivation of liberty.

WHEREFORE, DuPont demands judgment for damages, attorney's fees and costs against Bustamante and demands a trial by jury on all issues so triable.

Count III- Roe

47. DuPont re-alleges and incorporates herein the allegations in paragraphs 1-23.

48. The arrest of DuPont without probable cause was a direct and proximate result of the actions of Roe, which include, but are not limited to, the actions described above.

49. Through her actions in the above-described course of events, Roe, under color of § 489.127, Fla. Stat., and under the color of the authority of an unknown governmental agency, caused DuPont to be subjected to the deprivation of rights secured to him by the Constitution and

laws of the United States, including, but not limited to, his fourth amendment right to be free from unreasonable seizure of his person, his rights to bodily security and to be free of a deprivation of liberty.

WHEREFORE, DuPont demands judgment for damages, attorney's fees and costs against Roe and demands a trial by jury on all issues so triable.

Count IV- Doe

50. DuPont re-alleges and incorporates herein the allegations in paragraphs 1-23.

51. Doe is one or more unidentified employees of unknown government agencies who participated in the investigation of DuPont in Operation Handyman.

52. The arrest of DuPont without probable cause was a direct and proximate result of the actions of Doe while participating in Operation Handyman.

53. Through their actions in the above-described course of events, Doe, under color of § 489.127, Fla. Stat., and under the color of the authority of unknown government agencies, caused DuPont to be subjected to the deprivation of rights secured to him by the Constitution and laws of the United States, including, but not limited to, his fourth amendment right to be free from unreasonable seizure of his person, his rights to bodily security and to be free of a deprivation of liberty.

WHEREFORE, DuPont demands judgment for damages, attorney's fees and costs against Doe and demands a trial by jury on all issues so triable.

/s/ James N. Charles
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TRIAL COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by facsimile and U.S. Mail to Joseph H. Lee, Esquire and Henry A. Gill, Jr., Esquire, 2002 North Lois Avenue, Suite 700, Tampa, FL 33607, this 11th day of May 1998.

_____

Attorney